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### The Ethical Perils of Representing the Juvenile Defendant Who May Be Incompetent

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# The Ethical Perils of Representing the Juvenile Defendant Who May Be Incompetent

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Ethical standards evolve as legal systems change. Questions that are pertinent today might not have occurred to attorneys a decade or two ago. Today, an attorney with a client in juvenile court who may not understand the proceedings or have adequate decision-making skills faces complicated ethical questions.

These ethical dilemmas arise, in part, because of the hybrid nature of the modern juvenile court. When the first juvenile court was founded over a century ago, it was designed to protect the best interests of its juvenile clients.<sup>1</sup> The early juvenile court was supposed to serve as a conduit, funneling resources and support to children in need, and the proceedings were civil proceedings, without a need for a criminal justice overlay.<sup>2</sup>

Over the last few decades, juvenile court has become a very different place.<sup>3</sup> Juveniles who are adjudicated delinquent potentially face serious consequences, including “three strikes” laws that permit two juvenile adjudications to count as the first two strikes,<sup>4</sup> adult

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1. See Julian W. Mack, *The Juvenile Court*, 23 HARV. L. REV. 104, 119-20 (1909); N. Dickon Reppucci, *Adolescent Development and Juvenile Justice*, 27 AM. J. OF COMMUNITY PSYCHOL. 307, 312-13 (1999); Elizabeth S. Scott & Thomas Grisso, *The Evolution of Adolescence: A Developmental Perspective on Juvenile Justice Reform*, 88 J. CRIM. L. & CRIMINOLOGY 137, 141-42 (1997).

2. See Reppucci, *supra* note 1, at 312.

3. See Thomas Grisso, *Why Juvenile Justice Will Survive its Centennial*, in THE EVOLUTION OF MENTAL HEALTH LAW 167-80 (Lynda E. Frost & Richard J. Bonnie eds., 2001) (providing an overview and analysis of changes in the 1970s, 1980s, and 1990s).

4. See Richard E. Redding, *Using Juvenile Adjudications for Sentence Enhancement Under the Federal Sentencing Guidelines: Is it Sound Policy?*, 10 VA. J. SOC. POL'Y & L. 231 (2002).

sentencing guidelines and laws that permit or require consideration of juvenile adjudications,<sup>5</sup> sex offender registries that include juvenile offenders,<sup>6</sup> determinate sentences that couple a delinquency adjudication with a fixed sentence for a term of years that extends into adulthood,<sup>7</sup> and blended sentencing which expands juvenile judges' authority to impose adult sentences.<sup>8</sup> Indeed, although juvenile proceedings are still, technically, civil proceedings, they appear very similar to adult criminal court proceedings. Consequently, juveniles are afforded a host of due process protections to guard their rights against potentially serious losses of liberty.<sup>9</sup>

Similarly, attorneys' roles in juvenile court have changed. Before, an attorney might serve as a facilitator or guardian *ad litem* to ensure the child received appropriate resources;<sup>10</sup> however, in the modern juvenile court, the attorney should advocate for the client and zealously defend the client's interests.<sup>11</sup>

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5. *Id.* at 231-32.

6. See Nicole Marie Nigrelli, Comment, *The Sex Offender Registry: Is It Attacking People That Were Not Meant to Be a Part of the Law?*, 4 SUFFOLK J. TRIAL & APP. ADVOC. 343, 356 (1999) (discussing cases upholding a Massachusetts law requiring registration of juvenile sex offenders); Pamela S. Richardson, Note, *Mandatory Juvenile Sex Offender Registration and Community Notification: The Only Viable Option to Protect All the Nation's Children*, 52 CATH. U. L. REV. 237, 239-40, 255 (2002) (stating approximately thirty states require juvenile sex offenders to register).

7. See, e.g., Eric J. Fritsch & Craig Hemmens, *An Assessment of Legislative Approaches to the Problem of Serious Juvenile Crime: A Case Study of Texas 1973-1995*, 23 AM. J. CRIM. L. 563, 587-95 (discussing a Texas determinate sentencing scheme under which juvenile can receive a determinate sentence of up to forty years); Robert E. Shepherd, Jr., *Legal Issues Involving Children*, 28 U. RICH. L. REV. 1075, 1082-83 (1994) (reviewing a Virginia law permitting a determinate sentence of up to seven years for some juvenile offenders).

8. See Richard E. Redding & James C. Howell, *Blended Sentencing in American Juvenile Courts*, in THE CHANGING BORDERS OF JUVENILE JUSTICE: TRANSFER OF ADOLESCENTS TO THE CRIMINAL COURT 145 (Jeffrey Fagan & Franklin E. Zimring eds., 2000).

9. See *infra* notes 31-32 and accompanying text.

10. See Marvin R. Ventrell, *Rights & Duties: An Overview of the Attorney-Client Relationship*, 26 LOY. U. CHI. L.J. 259, 262 (1995).

11. MODEL RULES OF PROF'L CONDUCT R. 1.2, 1.3 (2003); ABA Inst. Jud. Admin., Standard 31 (1980) (Juvenile justice standard relating to counsel for private parties). *But see* MODEL CODE OF PROF'L RESPONSIBILITY EC 7-11, EC 7-12 (1981) (lawyer's role may vary depending upon age and competence of client). See also Christopher Slobogin & Amy Mashburn, *The Criminal Defense Lawyer's Fiduciary Duty to Clients with Mental Disability*, 68 FORDHAM L. REV. 1581, 1618 (2000) (arguing that a better construct would be to view the lawyer of a mentally disabled client as having a fiduciary duty to the client, something between a best interests and a zealous advocate position). The reality, however, often falls short of the

With the evolution of juvenile court to a more punitive criminalized model, the issue of adjudicative competence<sup>12</sup> has taken on a newfound importance. Potentially impaired juveniles present attorneys with complicated situations that have three dueling interests: the client's wishes, the best interests of the child, and the attorney's obligations as an officer of the court. This Article examines questions likely to arise with respect to these interests when an attorney suspects his or her juvenile client may be incompetent. Part I reviews the doctrine of adjudicative competence in the context of adult criminal proceedings. Part II summarizes the newly evolved application of the doctrine in juvenile court. Part III examines the ethical, legal, and practical considerations that arise when a lawyer has concerns about whether a juvenile client possesses the competence needed to participate appropriately in juvenile court proceedings.

## I. ADJUDICATIVE COMPETENCE IN ADULT CRIMINAL PROCEEDINGS

For decades, and even centuries, adjudicative competence has been an important prerequisite to a fair criminal court proceeding. Since the Middle Ages, courts have recognized a type of incompetence that would stop the progress of a criminal proceeding.<sup>13</sup> A more recent line of U.S. Supreme Court cases has developed a standard for competence rooted in the principle that it would be fundamentally unfair to try a criminal defendant who had no understanding of why he was on trial and how the trial process worked.<sup>14</sup> As a result, some criminal defendants with serious mental illnesses or mental retardation have been found to lack the capacity to proceed to trial.

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ideal. Redding, *supra* note 4, at 249-51.

12. While "competency to stand trial" is the common parlance, the construct in practice includes competence throughout the entire pre- and post-trial process. "Adjudicative competence" is a more precise term. See Richard J. Bonnie & Thomas Grisso, *Adjudicative Competence and Youthful Offenders*, in *YOUTH ON TRIAL: A DEVELOPMENTAL PERSPECTIVE ON JUVENILE JUSTICE* 73, 75 (Thomas Grisso & Robert G. Schwartz eds., 2000).

13. *Id.* at 74 (describing the impossibility of proceeding against a defendant who was "mute by visitation of God" and unable to enter a plea).

14. See *Drope v. Missouri*, 420 U.S. 162 (1975); *Pate v. Robinson*, 383 U.S. 375 (1966); *Dusky v. United States*, 362 U.S. 402 (1960).

### A. *The Substantive Standard for Incompetence*

In U.S. jurisprudence, the Supreme Court and lower courts have elaborated the standard for adjudicative competence. In 1960, the Supreme Court stated that a criminal defendant must have “sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding” and a “rational as well as factual understanding of the proceedings against him.”<sup>15</sup> In 1975, the Court added that a defendant must have the capacity “to assist in preparing his defense.”<sup>16</sup> Named after the two key Supreme Court cases, this standard for competence is commonly called the “*Dusky* and *Drope*” standard.

It is important to note that the competence standard references current mental state, as opposed to the insanity defense, which examines mental state at the time of the offense.<sup>17</sup> It also examines capacity, not willingness, to comply with the requirements placed upon a criminal defendant.<sup>18</sup> Finally, the defendant need only have “sufficient” capacity, not optimal, or even good capacity.<sup>19</sup> The same standard applies whether the defendant is evaluated for competence to stand trial, competence to plead guilty, or competence to perform any other act as part of a criminal trial.<sup>20</sup> The legal standard for competence does not reference the cause of an individual’s incompetence; it only references functional impairment. In practical terms, an adult with mental retardation or serious mental illness would fall below the threshold of competence.<sup>21</sup>

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15. *Dusky*, 362 U.S. at 402.

16. *Drope*, 420 U.S. at 171.

17. See GARY B. MELTON ET AL., *PSYCHOLOGICAL EVALUATIONS FOR THE COURTS: A HANDBOOK FOR MENTAL HEALTH PROFESSIONALS AND LAWYERS* 122 (2d ed. 1997).

18. *Id.*

19. *Id.* For example, Colin Ferguson, the defendant in the 1993 Long Island Railroad shooting case, was found to be competent despite his arguably bizarre approach to his defense. Slobogin & Mashburn, *supra* note 11, at 1608-09 (citations omitted) (providing a review of the Ferguson trial).

20. *Godinez v. Moran*, 509 U.S. 389, 398-401 (1993).

21. Most defendants found incompetent have at least a moderate level of mental retardation or a mental illness with currently active psychotic features or severely impaired judgment. The presence of documented mental retardation or mental illness is not, alone, sufficient to result in a finding of incompetence. The mental retardation or mental illness must be of such nature that the defendant lacks the “sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding, . . . [a] rational as well as factual

### *B. Procedural Requirements for Incompetence*

Adjudicative competence is a fundamental requirement for procedural fairness.<sup>22</sup> The defense attorney, the prosecutor, or the judge, *sua sponte*, can raise the question of a defendant's competence. As officers of the court, all actors are obliged to raise the question if they have a serious concern about the defendant's capacity. In practical terms, because the defense attorney typically has the first and most intensive contact with the defendant, the defense attorney is usually the one to raise the question.<sup>23</sup>

After a mental health professional evaluates a defendant, the judge or, more rarely, a jury<sup>24</sup> will determine whether the defendant is competent. If the defendant is competent, the criminal proceeding will move forward. If the defendant is incompetent, he will either be sent for treatment designed to restore his competence, or the charges will be dropped and he will be released.<sup>25</sup> Most defendants' competence can be restored in a relatively short period of time.<sup>26</sup> If a defendant cannot be restored within a reasonable time frame, he must be released.<sup>27</sup> Some states provide by law that civil commitment proceedings can be initiated at the time,<sup>28</sup> or permit the court to commit the defendant.<sup>29</sup>

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understanding of the proceedings against him," *Dusky v. United States*, 362 U.S. 402 (1960), or cannot assist in preparing his defense. *Drope v. Missouri*, 420 U.S. 162 (1975).

22. *Pate v. Robinson*, 383 U.S. 375, 378 (1966) ("the conviction of an accused person while he is legally incompetent violates due process.").

23. MELTON ET AL., *supra* note 17, at 126 (citing Bruce Winick, *Incompetency to Stand Trial: Developments in the Law*, in *MENTALLY DISORDERED OFFENDERS: PERSPECTIVES FROM LAW AND SOCIAL SCIENCE* 3 (John Monahan & Henry Steadman eds., 1983)).

24. In Texas, juries can decide the competence issue. TEX. CODE CRIM. PROC. ANN. art. 46.02 § 3(a) (Vernon). The 2003 legislature revised the law to permit a judge to make the competence determination if neither party requested a jury trial; prior to the change, a jury was required to determine competence in each case. The law goes into effect in January, 2004. 2003 TEX. SESS. LAW SERV. § 46B.051 (Vernon).

25. Some state statutes create an additional option. *See, e.g.*, 2003 TEX. SESS. LAW SERV. § 46B.101-17 (Vernon).

26. Restoration generally occurs through targeted education for a defendant with mental retardation or medication for a defendant with mental illness. The Supreme Court recently held that forcing a defendant to take medication in order to restore competence is permissible only in very limited circumstances. *Sell v. United States*, 123 S. Ct. 2174 (2003).

27. *Jackson v. Indiana*, 406 U.S. 715, 738 (1972).

28. *See, e.g.*, VA. CODE ANN. § 19.2-169.3 (Michie 2003 Cum. Supp.).

29. *See, e.g.*, LA. C.Cv.P. Art. 648 (West 2002).

## II. ADJUDICATIVE COMPETENCE IN JUVENILE COURT

While the doctrine of adjudicative competence is well-elaborated for adult criminal defendants, it has only recently been applied to juveniles in delinquency proceedings. Originally, the juvenile court focused on rehabilitation, and took actions perceived to be in the best interests of the child. As a result, standard due process protections in the adult criminal system did not apply in juvenile court. Juvenile mental health issues were addressed, if at all, through the provision of services.<sup>30</sup>

In the 1960s and 1970s, a series of cases applied most adult due process protections to juveniles in delinquency cases.<sup>31</sup> While not all protections were applied to juveniles, most were.<sup>32</sup> However, the Supreme Court has remained silent on whether adjudicative competence applies to juvenile proceedings.

In recent years, state legislatures and courts have filled the gap left by the Supreme Court's silence.<sup>33</sup> "[A]s of January of 2002, thirty-five states and the District of Columbia [had] case law and/or statutory provisions pertaining to adjudicative competence in juvenile court."<sup>34</sup> One state rejected the competency requirement and the remaining states are silent on the issue.<sup>35</sup>

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30. Juvenile offenders have a higher prevalence of many psychiatric disorders compared to other juveniles. See Fran Lexcen & Richard E. Redding, *Mental Health Needs of Juvenile Offenders*, 3 JUVENILE CORRECTIONAL MENTAL HEALTH REP. 1 (2002) (providing an overview of significant disorders).

31. *Breed v. Jones*, 421 U.S. 519, 541 (1975) (holding that juveniles are protected by the double jeopardy clause); *In re Winship*, 397 U.S. 358, 365-68 (1970) (holding that guilt must be proven beyond a reasonable doubt in delinquency proceedings); *In re Gault*, 387 U.S. 1, 31-59 (1967) (holding that a juvenile has the right to notice of charges, assistance of counsel, confrontation and cross-examination of witnesses, and privilege against self-incrimination); *Kent v. United States*, 383 U.S. 541, 557 (1966) (holding that a juvenile being considered for waiver to adult court is entitled to due process, including a hearing and a statement of reasons).

32. See *McKeiver v. Pennsylvania*, 403 U.S. 538 (1971) (providing the primary exception to expanding all adult due process protections to encompass juveniles by not extending right to a jury trial to juvenile delinquency proceedings).

33. See, e.g., Richard E. Redding & Lynda E. Frost, *Adjudicative Competence in the Modern Juvenile Court*, 9 VA. J. SOC. POL'Y. & L. 353 (2001) (providing a detailed description of issues addressed in the development of the Virginia statute).

34. *Id.* at 368.

35. *Id.* The Oklahoma Court of Criminal Appeals rejected the doctrine in juvenile court, but the holding was premised on the rehabilitative nature of the juvenile justice system. *G.J.I. v. Oklahoma*, 778 P.2d 485, 487 (Okla. Crim. App. 1989). Were the case heard today, the court

### A. The Substantive Standard for Incompetence

Not uncommonly, different procedures, or even different substantive standards, apply to juvenile court proceedings. Whereas adults may lack competence because of mental illness or mental retardation, a juvenile might lack competence simply because of age-appropriate immaturity.<sup>36</sup> Children begin to develop abstract reasoning capabilities around age twelve and may find it difficult to make rational decisions on some matters prior to that point.<sup>37</sup> Significantly, in a study of 136 juveniles ages nine to sixteen, Cowden and McKee found that competence increased dramatically as the age of the juvenile increased.<sup>38</sup> Noted expert, Dr. Grisso, recommends that juveniles under age fourteen be presumed incompetent.<sup>39</sup> Some states have responded to concerns about the number of juveniles potentially found incompetent because of young age by changing the substantive standard to require that incompetence be the result of mental health or mental retardation.<sup>40</sup>

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might reach a different conclusion. Since 1989, juvenile court has become far more criminalized and adjudications of delinquency bring more harmful long-term consequences. See *supra* notes 3-8 and accompanying text.

36. See, e.g., Thomas Grisso & Laurence Steinberg, *Juvenile Competence: Can Immaturity Alone Make an Adolescent Incompetent to Stand Trial?*, 9 JUV. JUST. UPDATE 2 (2003).

37. See, e.g., JEAN PIAGET, *THE PSYCHOLOGY OF THE CHILD* (1972) (stating the formal operations stage of cognitive development begins around age twelve, and includes abstract reasoning capabilities). See also Adam Ortiz, A.B.A. Juvenile Justice Center, *Adolescent Brain Development and Legal Culpability*, 2003 A.B.A. CRIM. JUST. SEC. Recent studies on the brain development of adolescents reveal that the frontal lobe undergoes significant change from age twelve through twenty-two; part of the frontal lobe, the prefrontal cortex, controls executive functions such as prioritizing thoughts, thinking abstractly, anticipating consequences, planning, and controlling impulses. *Id.* As a result, teens are likely to rely more on instinct than on reasoning when they act. *Id.* These differences suggest that evaluation of the competence of juveniles must qualitatively be different from the evaluation of competence in adults. This poses a challenge for courts that have traditionally recognized only one standard of competence for both adults and juveniles. *Id.*

38. Vance L. Cowden & Geoffrey R. McKee, *Competency to Stand Trial in Juvenile Delinquency Proceedings—Cognitive Maturity and the Attorney-Client Relationship*, 33 U. LOUISVILLE J. FAM. L. 629, 652-53 (1995).

39. Thomas Grisso, *The Competence of Adolescents as Trial Defendants*, 3 PSYCHOL. PUB. POL'Y & L. 3, 23 (1997).

40. See, e.g., D.C. CODE ANN. § 16-2315(c)(1) (2001). The Supreme Court has not decided whether it is constitutional for the state to apply to juvenile proceedings a standard of competence less than the *Dusky* and *Drope* standard applied to adults, although several state courts have held that a juvenile standard cannot fall below the level of protection provided by



Several state courts apply the adult, constitutionally required standard, but operationalize it differently.<sup>41</sup>

### *B. Procedural Requirements for Incompetence*

Because there is no clear constitutional requirement for a competence doctrine in juvenile court, procedures for raising and determining the issue vary from state to state. With some variations, they generally will track the procedures for adults described in section I.B. However, because a growing child can change rapidly in a short period of time, juvenile courts frequently operate on time frames that are more compressed than those in adult proceedings. For example, some states require frequent reports to the court regarding juveniles involved in the process to restore competence.<sup>42</sup> Other states shorten the length of time juveniles can be subject to restoration.<sup>43</sup> Some procedural variations address the importance of keeping the juvenile in the community whenever possible.<sup>44</sup>

Clinical practice standards may also vary across jurisdictions. According to Dr. Grisso, a leading authority on juvenile competence, the following are components of many competency evaluations: (1) a

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the adult standard. *See, e.g., In re W.A.F.*, 573 A.2d 1264, 1267 (D.C. 1990); *In re S.H.*, 469 S.E.2d 810, 811 (Ga. Ct. App. 1996); *In re D.D.N.*, 582 N.W. 2d 278, 281 (Minn. Ct. App. 1998). Dr. Grisso has suggested that the competence requirement should be lower for juveniles facing minor charges. Grisso, *supra* note 39, at 26.

41. *See Ohio v. Settles*, No. 13-97-50, 1998 WL 667635 at \*3 (Ohio App. Dist. Sept. 30, 1998); *In re W.A.F.*, 573 A.2d at 1268 (Farrell, J., concurring).

42. *See, e.g., ARK. CODE ANN. § 9-27-502(9)(B)* (2002) (requiring a report every 30 days); *N.Y. JUD. CT. ACTS. § 322.2(5)(d)* (1999) (requiring report after 45 days, then every 90 days).

43. *Compare ARIZ. REV. STAT. §§ 8-291.09(F), 8-291.10(F)* (1999) (allowing a 240 day maximum for juveniles) *with ARIZ. REV. STAT. § 13-4515(A)* (1999) (allowing adult maximum of 21 months or length of potential sentence). *Compare TEX. FAM. CODE ANN. § 55.33(a)(1)(A)* (Vernon 2002) (allowing a 90 day maximum for juveniles) *with 2003 TEX. SESS. LAW SERV. §§ 46B.073(b), 46B.081(a)(c)* (Vernon) (allowing 180 day maximum for adults).

44. *See, e.g., FLA. STAT. Ann. § 985.223(2)* (West 2001) (stating a child who committed an act that would be misdemeanor for an adult may not be committed for purposes of restoration to competence); *LA. CHILD CODE art. 837(B)(2)* (West 1995) (permitting the court to “place the child in the custody of his parents or other suitable person under such terms and conditions as deemed in the best interests of the child and the public, which conditions may include the provision of outpatient services by the Department of Health and Hospitals, office of mental health.”).

social history inquiry to learn about the youth's past and present life; (2) an inquiry into the youth's past experience with the police and courts; (3) an inquiry into the youth's story about the events surrounding the offense; (4) an assessment of the youth's competencies; and (5) a mental status exam or psychological testing.<sup>45</sup> The testing is the most important component if the other parts of the interview show deficits in the youth's functional abilities.<sup>46</sup> The attorney who represents a juvenile who must be evaluated for competence must understand the evaluation process, including the purpose of each test the evaluator employs, what it is designed to evaluate, and its limitations.

Once the interview and the other components of the evaluation process are completed, the evaluator has the daunting task of interpreting the results in such a way that they will be useful to legal professionals. To draft a report of the forensic evaluation, the clinician must identify the deficits that the evaluation revealed and assess how those deficits impact the youth's ability to consult with the lawyer with a "reasonable degree of rational understanding" and to have a "rational as well as factual" understanding of the proceedings.<sup>47</sup> It is also important for the evaluator to identify the causes of the deficits.<sup>48</sup> If, based on the deficits, the court might conclude that the youth is incompetent, the evaluator should investigate whether the deficits can be overcome and, if so, how.<sup>49</sup> While the court will make the ultimate determination of whether the youth is legally competent, the court's determination will best be aided by an evaluation report, written in terms that lay people can understand, that clearly identifies deficits and their impact on those abilities that are relevant to the legal standard for competence.<sup>50</sup>

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45. THOMAS GRISSO, FORENSIC EVALUATION OF JUVENILES 101-05 (1998).

46. *Id.* at 104.

47. *Dusky v. United States*, 362 U.S. 402 (1960).

48. GRISSO, *supra* note 45, at 110-15.

49. *Id.* at 115-22.

50. Some state statutes required certain elements be included in the evaluation report. *See, e.g.*, 2003 TEX. SESS. LAW SERV. § 46B.025 (Vernon).

### III. ETHICAL, LEGAL, AND PRACTICAL CONSIDERATIONS REGARDING JUVENILE COMPETENCE

Case law and statutory schemes can play out in many different ways in delinquency cases. Juvenile defense attorneys are increasingly called upon to wrestle with complicated and conflicting ethical mandates. A logical and principled approach to the issues can help ensure a responsible and reasonable resolution to complex ethical questions.

The *Dusky* and *Drope* standard for competence is that a person must have sufficient “present ability” to consult with her lawyer with a “reasonable degree of rational understanding” and have a “rational as well as factual” understanding of the proceedings against her.<sup>51</sup> The challenge facing any lawyer who represents children is how to evaluate the applicability of this legal standard to individuals who have not yet fully developed physically, intellectually, and emotionally. This complex challenge requires the attorney to recognize indicia of incompetence in children, assess whether the issue should be raised before the trial court, and, when raising the question of competence, frame the inquiry in a concrete and constructive manner.

#### *A. Detecting Questionable Competence*

An attorney will have a number of means to gather data that could raise a question about the juvenile client’s competence. Perhaps the most crucial mean is the initial interview, which can trigger a more thorough investigation into the client’s current mental state.

##### 1. Initial Interview with Client

Recognizing when a child client’s adjudicative competence may be an issue may seem like a simple question, but it is actually quite complex. First, the dynamic of the interview may inhibit recognizing

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51. See *Dusky*, 362 U.S. at 402; *Drope v. Missouri*, 420 U.S. 162, 171 (1975) (noting that “[A] person whose mental condition is such that he lacks the capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense may not be subjected to a trial.”).

indicia of incompetence. For example, lawyers may accept a different level of responsiveness from child clients than they would from adult clients. As a result, lawyers may interpret the reticence of a child client to speak to them as a normal reaction of a child to an adult stranger in a position of authority, rather than as the child's failure to understand the question. Thus, attorneys may be more willing to resort to leading questions when interviewing a child client than they would be when interviewing an adult. While attorneys are taught the importance of avoiding leading questions when interviewing clients,<sup>52</sup> they may, nonetheless, resort to them when dealing with a child who replies to inquiries with only monosyllabic answers or shakes of the head. Those leading questions may not only suggest to the child the answers the attorney wants, but also may form in the mind of the attorney the perception that the child understands the question. These problems will be compounded if the child has mental retardation, which could heighten the child's tendency to agree with the attorney and avoid lengthy dialogue.<sup>53</sup>

Interviewing difficulties may well be exacerbated if the child client is in detention. While developing rapport with a client is always important, it is particularly so with children who may not fully understand the attorney's role and how the attorney can be of assistance. As a result, attorneys may find that it takes longer to develop rapport with juvenile clients than it does with adult clients.<sup>54</sup> When an interview is conducted in a detention center, the setting may actually inhibit building rapport with the child and ultimately limit both how much information the attorney gets from the child client and how much information the attorney effectively conveys. Putting a child in detention at ease is difficult and an effective interview process is likely to require multiple visits. As a practical matter, attorneys who represent child clients may underestimate the time

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52. See, e.g., Robert M. Bastress & Joseph D. Harbaugh, *Interviewing, Counseling, and Negotiating*, in ANATOMY OF THE INITIAL CLIENT INTERVIEW 101 (1990).

53. See Richard J. Bonnie, *The Competence of Criminal Defendants with Mental Retardation to Participate in Their Own Defense*, 81 J. CRIM. L. & CRIMINOLOGY 419, 420-21 (1990) (noting that with adult defendants, attorneys often do not recognize significant mental disorders that can impact competence).

54. See JAMES R. MORRISON & T.F. ANDERS, *INTERVIEWING CHILDREN AND ADOLESCENTS* 122 (1999).

needed and fail to spend the time necessary to develop the rapport needed both to get untainted information and to convey information in such a way that the child understands and absorbs it.

There are steps that attorneys can take to help prepare for interviews with child clients. However, the attorney must understand that competence is more likely to be an issue with child clients than it is with adult clients. Dr. Grisso suggests that competence considerations should occur whenever a child: (1) is twelve or younger, (2) has been diagnosed or treated for a mental illness or mental retardation, (3) has a learning disability or a “borderline” level of intellectual functioning, or (4) exhibits behavior or responses that suggest deficits in memory, attention, or interpretation of reality.<sup>55</sup> An attorney should not necessarily request a competency evaluation whenever any of these conditions are present, but the existence of any condition should alert the attorney to consider more carefully whether the juvenile is showing any signs of impaired competence.<sup>56</sup>

Keeping this in mind, before meeting with the child client, the attorney representing a child may want to gather background information about the child’s school and mental health history. When that is not possible, and most often it is not, the attorney ought to probe these areas during the first interview.<sup>57</sup> However, attorneys must keep in mind that clients may not always be accurate reporters of these issues.

## 2. Collateral Information

If an attorney suspects her client may be incompetent, there is additional information that she could, and should, gather before making any decisions about what steps to take next. Each of the following should be considered:

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55. GRISSE, *supra* note 45, at 88.

56. *Id.*

57. The Appendix lists questions an attorney may want to ask a juvenile client.

a. Interview with parent(s) or guardian

The client's parent or legal guardian may be able to provide some or all of the information the attorney needs. The attorney should ask about the child's performance in school, including whether the child has ever received special education services. The parent or guardian may also be able to report if the child has emotional, behavioral, or adjustment problems at home or at school and possible causes for those problems. The attorney should consider asking the parent or guardian to authorize disclosure of the child's educational records, and allow school personnel to talk with the attorney about the child's performance and adjustment.<sup>58</sup>

In the interview with the parent or guardian, the attorney should also ask if the child has ever received mental health services and if the child is taking any prescription medications. If the guardian has told the attorney anything that suggests that relevant medical or mental health records exist, the attorney should also consider getting an authorization permitting disclosure of these records.<sup>59</sup>

b. Review of school records

School records often provide a wealth of information in detail that parents may not be able to provide. School records will indicate whether and why the child is receiving special education services. For example, the child might have a disability that would interfere with her ability to process information presented to her orally.<sup>60</sup> She

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58. These records are protected from public scrutiny, however, a parent may grant access to them. *See* Family Educational Rights and Privacy Act, 20 U.S.C. § 1232(g) (1994); 34 C.F.R. § 99.30 (2002) (requiring that a parent or eligible student consent before an educational institution discloses certain information). State statutes may also protect these records from unauthorized disclosure. *See, e.g.,* VA. CODE ANN. § 22.1-287 (Michie 2002).

59. In the Health Insurance Portability and Accountability Act (HIPAA), federal law recognizes the use of such an authorization. Pub. L. No. 104-191, 110 Stat. 1936 (1996) (codified as amended in scattered sections of 29 U.S.C.). *See also* Security and Privacy Rules, 45 C.F.R. § 164.502(a)(1)(iv) (2003). There may, however, be exceptions in some states for certain mental health records, and federal law has more specific restrictions for records involving substance abuse treatment. *See* 42 C.F.R. § 2.14 (2003).

60. A variety of learning disorders could negatively impact a juvenile's ability to work with the attorney. *See* AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS, 49-56 (4th ed. 2000) (describing various learning disorders).

might also have mental retardation that would interfere with her present ability to consult with her lawyer with a reasonable degree of rational understanding, and to have or develop a “rational as well as factual understanding” of the proceedings against her.<sup>61</sup> She may have Attention-Deficit Hyperactivity Disorder (ADHD)<sup>62</sup> or an emotional problem that would make it difficult for her to work with her attorney or to understand and participate appropriately in legal proceedings. Special education records that might be particularly revealing are eligibility committee meeting minutes, evaluation reports compiled as part of the eligibility process or as part of the triennial review process, and Individualized Education Programs (IEPs).<sup>63</sup>

It is important to note that placement in regular rather than special education does not mean that the child does not have issues that interfere with her competence. Some children who would be eligible for special education services because of mental or emotional disabilities are overlooked because school systems fail to identify their disabilities or because they identify the existence of a disability, but conclude that it is not severe enough for the child to qualify for special education services.<sup>64</sup> Indicators in the records of children who are not receiving special education services include such things as referrals to child study committees for consideration of a possible disability, relatively regular disciplinary referrals, or comments about a child’s social skills that suggest deficits in relationships with peers or adults. These indicators may be of even greater significance if they

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61. *Dusky v. U.S.*, 362 U.S. 162 (1975).

62. ADHD is characterized by a persistent pattern of inattention and/or hyperactivity-impulsivity more frequent and more severe than behavior of peers at the same developmental level. AM. PSYCHIATRIC ASS’N, *supra* note 60, at 85-93. Some symptoms must be present prior to age seven and the consequential impairment in social, academic, or occupational functioning must be present in at least two settings and not be exclusively related to another mental disorder. *Id.*

63. The Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1414 (2003), requires schools to use a variety of assessment tools to gather information about a child who is suspected of having a disability that interferes with learning. The assessment results are used to determine eligibility for educational services and to create an individualized education program for the child. *Id.*

64. Not every child with a disability will qualify for special education services. In addition to having a listed disability, the child must have show a need for special education services. 20 U.S.C. § 1401(3)(A)(ii) (2003).

appear early and continue as the child ages. They may, for example, be signs that the child is experiencing emotional difficulties that have gone undiagnosed. They may even be indicators of undiagnosed learning disabilities that hamper information processing.<sup>65</sup> Such processing difficulties can lead to disaffection in the classroom if the child is unable to convey information or otherwise understand and participate fully in the educational process.

Access to these records can be so important that, if a parent refuses to release them, the attorney should consider requesting a subpoena for them. Of course, access to the records alone may not be valuable unless the attorney develops skills to read and interpret educational data or has contacts who can explain this information.<sup>66</sup>

### c. Interviews with teachers and other school personnel

Because educational records are confidential, a teacher or other school employee may choose not to speak with an attorney representing a child who does not have parental authorization. Therefore, the attorney should seek such authorization. However, even without it, the attorney can talk to these individuals about their observations of a child. School personnel's personal observations are not included in the definition of educational records,<sup>67</sup> and such observations may provide the attorney with sufficient information to decide how to proceed. Because teachers, guidance counselors, and others may have useful information about how the child learns and what her interpersonal relationships are like, they may provide insight into her competence. In addition, such individuals may make knowledgeable witnesses if the lawyer decides to raise the question of competence.

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65. See Richard E. Redding, *Barriers to Meeting the Mental Health Needs of Offenders in the Juvenile Justice System*, 1 JUV. CORR. MENTAL HEALTH REP. 24, 26 (2001) (many juvenile offenders have undiagnosed or untreated learning disabilities).

66. The authors have found that professors at colleges and universities are often willing to share time and expertise to explain educational or psychological tests results that are often included in these reports. We recommend that the attorney seeking such assistance get permission from the client and the client's parent or guardian to share the records with other professionals for consultation purposes.

67. 20 U.S.C. § 1232g (a)(4) (2003).



#### d. Review of medical and mental health records

Like educational records, medical and mental health records are confidential and protected by state and federal law.<sup>68</sup> The attorney generally will need written authorization or a court order to see them and should recognize that records addressing substance abuse treatment are covered by even more stringent privacy protections.<sup>69</sup> Medical records typically include health history, records of trauma, and could even include neurological evaluations if the parent had reported cognitive concerns. Mental health records include such things as social histories, psychological evaluations, and treatment and progress notes.<sup>70</sup> As with educational records, medical and mental health records can prove incredibly helpful to the attorney trying to understand the mental capabilities of an adolescent client, particularly given the higher than average rate of psychiatric disorders among juvenile offenders.<sup>71</sup> Further, these records can identify professionals who are familiar with the client and the client's mental health status, who may be able to provide useful information or who could be called as witnesses.

### 3. Subsequent Interviews with the Client

No matter what information the attorney may learn from outside sources, she should conduct a second interview with her client to try to get a better sense of the youth's communication skills or deficits and ability to remember and understand information. The attorney should keep in mind that court involvement, particularly placement in detention, is unsettling and that interviewing a client in a foreign setting, such as detention, can inhibit the ability to establish rapport and, consequently, communication. Those factors could have a negative impact on how a client reacts to an initial conversation, but

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68. HIPAA, Pub. L. No. 104-191, 110 Stat. 1936 (1996) (codified as amended in scattered sections of 29 U.S.C.). Psychotherapy notes receive a higher level of protection under HIPAA than other protected health information. 45 C.F.R. § 164.508(a)(2) (2003).

69. See 42 U.S.C. § 290dd-2 (2003); 42 C.F.R. Part 2.

70. See BAKER & VOLENIK, *EVERYBODY'S TALKING* (2002 Commonwealth Inst. for Child and Family Studies), available at <http://www.vcuhealthy.org/vtcc/everybodytalking>

71. Lexcen & Redding, *supra* note 30.

may have less influence in later interactions. Therefore, a second interview is a good opportunity to test whether the client remembers what was talked about during the first interview and whether she appears to understand concepts that they discussed. Testing the client's memory and understanding can give the attorney a sense of whether she should be concerned about the client's long and/or short term memory. Both can be relevant to the decision whether to raise the issue of competence.

### *B. Ethical Considerations in Requesting a Competency Evaluation*

Ultimately, the decision to ask for a competency evaluation implicates the attorney's ethical and legal responsibilities. Complicated ethical questions can arise when representing an incompetent adult defendant,<sup>72</sup> and even more ethical questions arise when representing a child who may lack the competence necessary for the adjudicatory process. The ABA Criminal Justice Mental Health Standards<sup>73</sup> provide guidance, stating, "[d]efense counsel *should* move for evaluation of the defendant's competence to stand trial whenever the defense counsel has a good faith doubt as to the defendant's competence."<sup>74</sup> The standard further states that the attorney "*may*" move for a competency evaluation "over the client's objection," but "*should* make known to the court and to the prosecutor those facts known to counsel which raise the good faith doubt of competence."<sup>75</sup> The commentary suggests that if a defense attorney thinks it would be better for an incompetent defendant facing minor charges to proceed to trial, the attorney's obligations as an officer of the court prevent the attorney from misleading the court by failing to present information that raises a good faith doubt about the

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72. See, e.g., Gregory Brown, Note, *The Ethical Binds When Representing the Incompetent Defendant*, 4 SUFFOLK J. TRIAL & APP. ADVOC. 49 (1999).

73. These Standards were developed with the adult defendant in mind.

74. ABA CRIMINAL JUSTICE MENTAL HEALTH STANDARDS 7-4.2(c) (1989) (emphasis added).

75. *Id.* (emphasis added).

client's competence.<sup>76</sup> That obligation may override the attorney's duty to zealously<sup>77</sup> represent the client.<sup>78</sup>

One of the commentator's concerns is that if defense counsel raises the competence question in every case in which she has concerns about a client's competence, counsel may become a friend of the court, changing the role of defense counsel from zealous advocate to something less.<sup>79</sup> For example, a lawyer may have to divulge information normally protected by the lawyer-client privilege in order to raise the issue. Model Rule of Professional Conduct 1.6 prohibits lawyers from revealing information protected by the lawyer-client privilege or information gained in the professional relationship that the client has requested be held inviolate because it would be embarrassing or detrimental to the client.<sup>80</sup> Nonetheless, many exceptions are made to the rule, and disclosure in this situation might be necessary to comply with the law.<sup>81</sup> In addition, courts have ruled attorneys should reveal the information if the court needs it to assess the appropriateness of ordering a competency evaluation or to determine competence.<sup>82</sup>

The attorney must also consider whether the decision to raise competence is a decision that rests with the client or with the

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76. *Id.* at 7-4.2 cmt.

77. When acting as advocate, "a lawyer zealously asserts the client's position under the rules of the adversary system." MODEL RULES OF PROF'L CONDUCT preamble para. 2 (2003).

78. *But see* ABA CRIMINAL JUSTICE MENTAL HEALTH STANDARDS, *supra* note 74, at 7-4.2 cmt. (noting that some commentators who take the position that "should" is discretionary and who suggest that the failure to disclose possible incompetence is not equivalent to the attorney's obligation to disclose fraud).

79. *Id.*

80. *See* MODEL RULES OF PROF'L CONDUCT R. 1.6(a) (2002) (extending confidentiality to all information relating to the representation of a client, except for disclosures made with client consent after a consultation, or disclosures that are implicitly authorized to fulfill the lawyer's obligation).

81. MODEL RULES OF PROF'L CONDUCT R. 1.6(b)(4). There may be exceptions to the confidentiality requirement under certain state law. *See, e.g.,* VIRGINIA RULES OF PROF'L CONDUCT 1.6(b)(1) (permitting a lawyer to reveal information to the extent she or he reasonably believes is necessary "to comply with law or a court order."). Model Rule 1.6(b) is more restrictive, permitting a lawyer to reveal information only to prevent a criminal act that would result in imminent death or bodily harm or to establish a defense for the lawyers in legal controversies involving the client. MODEL RULES OF PROF'L CONDUCT R. 1.6(b).

82. *See* Rodney J. Uphoff, *The Role of the Criminal Defense Lawyer in Representing the Mentally Impaired Defendant: Zealous Advocate or Officer of the Court?*, 1988 WIS. L. REV. 65, 109 n.118.

attorney.<sup>83</sup> Rule 1.2 of the Model Rules of Professional Conduct states that a lawyer “shall abide by a client’s decisions concerning the objectives of representation and . . . shall consult with the client as to the means by which they are to be pursued.”<sup>84</sup> The client has the ultimate authority to determine the purposes to be served by the representation, and the lawyer is not required to employ a particular means to achieve those purposes. Nonetheless, the Model Rules suggest that the lawyer is to determine technical and tactical issues while deferring to the client’s judgment on “expense[s] to be incurred and concern for third persons who might be adversely affected.”<sup>85</sup> Relying on this provision, the lawyer should consider whether raising competence is a legal tactic or a technical issue that is at the lawyer’s discretion, or whether it is an objective of the representation, and thus the client’s decision. This is a question complicated by concerns that it may not be possible to adequately consult with a child who may lack the capacity to understand the competency issue because of mental retardation, mental illness, immaturity, or a combination of these factors. The lawyer must, at a minimum, explain to the client why she thinks competence should be raised, what will happen once the issue is raised, and what the possible outcomes are once the issue is raised.

In evaluating a course of action, defense counsel must take into account how the juvenile system differs from the adult system. In adult criminal court, the legal issues surrounding adjudicative competence have been clarified by decades of judicial decisions. The legal status of juvenile competence in delinquency proceedings is less clear. Although increasingly “criminal” in nature, the juvenile court system has always been viewed as a hybrid of the criminal and civil

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83. The same question occurs when deciding whether to raise an insanity defense, but the analysis differs in that in adult court and in some state courts, competence is a constitutionally required prerequisite to a fair judicial proceeding, whereas an insanity defense is a state-created doctrine. For an analysis of ethical issues in raising an insanity defense, see Slobogin & Mashburn, *supra* note 11. See also Thomas R. Litwack, *The Competency of Criminal Defendants to Refuse, for Delusional Reasons, a Viable Insanity Defense Recommended by Counsel*, 21 BEHAV. SCI. & L. 135 (2003); Josephine Ross, *Autonomy Versus a Client’s Best Interests: The Defense Lawyer’s Dilemma When Mentally Ill Clients Seek to Control Their Defense*, 35 AM. CRIM. L. REV. 1343 (1998).

84. MODEL RULES OF PROF’L CONDUCT R. 1.2 (2002).

85. *Id.* at R. 1.2, cmt. ¶ 2.

systems,<sup>86</sup> and the legal protections available may differ between the two court systems. For example, the Virginia Supreme Court recently held that a juvenile “does not have a [constitutional or] statutory right to assert the defense of insanity at the adjudicatory phase of . . . [a] delinquency proceeding.”<sup>87</sup> Thus, an attorney who practices in Virginia must consider whether the inability to raise the insanity defense should play a role in deciding to raise the issue of the juvenile’s competence. In strictly legal terms, an insanity defense<sup>88</sup> looks at mental state at the time of the offense, while the competence standard examines current mental state. Thus, the two questions are separate and distinct. In practical terms, however, there is some evidence that when the insanity defense is abolished competence is questioned more frequently.<sup>89</sup>

The United States Supreme Court has opined that it would be contradictory to allow an adult incompetent criminal defendant to waive the competency requirement because such a waiver could not be knowing or intelligent.<sup>90</sup> It follows that if a defendant can not waive the right to be tried if incompetent, then counsel cannot waive it for him. According to the Supreme Court in *Pate*, the defendant’s constitutional due process right to a fair trial was abridged because he did not get a competence hearing.<sup>91</sup> Because the record was replete with evidence that raised the specter of incompetence, the Court ordered the defendant discharged unless he was retried within a reasonable time.<sup>92</sup>

Courts addressing the adjudicative competence issue for adults frequently conclude that the failure to raise the competence issue amounts to ineffective assistance of counsel.<sup>93</sup> Crucial to such a

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86. See *In re Gault*, 387 U.S. 1, 17 (1967).

87. *Commonwealth v. Chatman*, 538 S.E.2d 304, 309 (Va. 2000).

88. The elements of an insanity defense are established by state law and, therefore, the specifics of the defense will vary among jurisdictions.

89. RALPH REISNER & CHRISTOPHER SLOBOGIN, *LAW AND THE MENTAL HEALTH SYSTEM: CIVIL AND CRIMINAL ASPECTS* 558 (2d ed. 1990) (citing Callahan et al., *The Impact of Montana’s Insanity Defense Abolition*, POLICY RES. ASSOCIATES, INC. (July 1988)).

90. *Pate v. Robinson*, 383 U.S. 375, 384 (1966).

91. *Id.* at 385.

92. *Id.* at 387.

93. See, e.g., Richard J. Bonnie, *The Competence of Criminal Defendants: Beyond Dusky and Drope*, 47 U. MIAMI L. REV. 539 (1993); Norma Schrock, *Defense Counsel’s Role in Determining Competency to Stand Trial*, 9 GEO. J. LEGAL ETHICS 639 (1996).

finding is that there is a “sufficient indicia of incompetence to give objectively reasonable counsel reason to doubt the defendant's competency and there is a reasonable probability that the defendant would have been found incompetent to stand trial had the issue been raised and fully considered.”<sup>94</sup>

Because the adult cases suggest that failure to raise the issue of competence constitutes ineffective assistance of counsel, the attorney who represents a juvenile client must give due consideration to whether she can ethically choose not to raise competence if she thinks there are sufficient indicia of incompetence. When states codify a competency requirement, it often includes a standard for the level of concern that should give rise to a competency evaluation.<sup>95</sup> Therefore, the attorney representing a juvenile client should be concerned about whether the state standard has been met. Where there is no established standard, it is probably appropriate to think in terms of a fairly low standard, like probable cause.

The attorney must weigh this concern against potential negative consequences that may flow from raising the issue, because, under certain circumstances, there may appear to be more negative than positive consequences. For example, the lawyer-client relationship may be poisoned if the attorney raises the issue over the explicit objection of the client. While the discussion above suggests that the competence issue must be raised no matter what the considerations are, several commentators have suggested that under some circumstances it should not be raised.<sup>96</sup>

Both Winick and Bonnie suggest approaches to the question of whether to raise competence that are more practical in nature and more in keeping with the traditional defense role.<sup>97</sup> They would take

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94. *Jermyn v. Horn*, 266 F.3d 257, 283 (3d Cir. 2001).

95. For example, the Juvenile Code of Virginia simply states “If...the court finds, sua sponte or upon hearing evidence or representations of counsel for the juvenile or the attorney for the Commonwealth, that there is probable cause to believe that the juvenile lacks substantial capacity to understand the proceedings against him or to assist his attorney in his own defense, the court shall order that a competency evaluation be performed . . .” VA. CODE ANN. § 16.1-356(A) (Michie 2002).

96. See Uphoff, *supra* note 82; Bruce J. Winick, *Criminal Law: Reforming Incompetency to Stand Trial and Plead Guilty: A Restated Proposal and a Response to Professor Bonnie*, 85 J. CRIM. L. & CRIMINOLOGY 571 (1995).

97. Bonnie, *supra* note 93, at 567-75; Winick, *supra* note 96, at 595 (suggesting that

into account situations in which both client and attorney agree that competence should not be raised, even if the client lacks certain competencies.<sup>98</sup> Bonnie also addresses the attorney's constitutional and ethical obligations to explore fully the issue of competence, including consulting mental health professionals when good faith doubts about competence exist.<sup>99</sup> Bonnie argues, however, that the exploration of competence could stop short of raising the issue before the court until the investigation establishes a clear doubt about the client's competence.<sup>100</sup> He proposed amending the Virginia juvenile competence statute to make privileged the content of a competency evaluation requested by the defense attorney unless the report raised significant questions about the juvenile's competence.<sup>101</sup> Of significance is Bonnie's assertion that client competence issues are often substitutes for the underlying issue of counsel's inadequate performance, an issue that is frequently hard to raise successfully.<sup>102</sup>

Winick, on the other hand, tackles the very difficult question of how to account for lawyers' strategic decision-making that takes into account the consequences of adjudication versus the consequences of an incompetence determination.<sup>103</sup> Winick posits that a waiver of competence should be permitted in limited circumstances where defendants "clearly and voluntarily" say they want to go to trial and their lawyers concur.<sup>104</sup> He also suggests that the more serious the offense and its consequence, the higher the degree of competence the

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legislatures adopt a more flexible approach to competence).

98. Bonnie, *supra* note 93, at 561-75; Winick, *supra* note 96, at 595.

99. Bonnie, *supra* note 93, at 567.

100. *Id.* at 566.

101. In an unpublished memorandum, Bonnie suggested amending Virginia Code § 16.1-356(E) to include the statement

If the question of competency was raised by the court sua sponte or by the attorney for the Commonwealth under subsection A, the evaluator shall send the report to the court and the attorneys of record. If the question of competency was raised by the attorney for the juvenile under subsection A, the report shall be sent only to the attorney for the juvenile. If, after receiving the report, the attorney for the juvenile has a significant doubt about the juvenile's competency for adjudication or disposition, the attorney shall send copies of the report to the court and the attorney for the Commonwealth.

Memorandum from Richard J. Bonnie (on file with author).

102. Bonnie, *supra* note 93, at 567.

103. Winick, *supra* note 96.

104. *Id.* at 583.

defendant must exhibit in order to waive important rights, even with counsel's concurrence.<sup>105</sup> This sliding scale approach would, in his view, protect the "accuracy and moral dignity of the criminal process."<sup>106</sup>

Prior to raising the competence issue, the lawyer should assess how this issue will affect the relationship with the client. The Model Rules of Professional Conduct state that a lawyer should seek to maintain a normal relationship with a client with a mental disability.<sup>107</sup> A lawyer may seek the appointment of a guardian or take other protective action with respect to a client "only when the lawyer reasonably believes that the client cannot adequately act in the client's own interest."<sup>108</sup> As a result, the attorney is obligated to achieve as normal a lawyer-client relationship with the child as she can. This includes communicating to the client all facts pertinent to the matter.

Model Rule 1.4 states that the attorney must inform the client about the status of the matter and any relevant facts and communications, so the client has enough information to make informed decisions.<sup>109</sup> Therefore, the attorney must explain, at a minimum, the nature of the offense(s) charged, potential dispositions, and the long-term ramifications of conviction, including the possibility that the client's record will be expunged at a later date. In addition, the attorney should explain the process for evaluating competence, the competence restoration process that will follow if the client is found incompetent, and the options open to the court if the client is found unrestorably incompetent. All of these elements have different consequences, and the attorney should be concerned about whether the client understands them. The consequences of being found incompetent should be weighed against the consequences of a delinquency adjudication, including commitment

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105. *Id.* at 592.

106. *Id.* at 591-92.

107. MODEL RULES OF PROF'L CONDUCT R. 1.14(a) (2002) ("When a client's ability to make adequately considered decisions in connection with a representation is impaired, whether because of minority, mental disability or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.").

108. *Id.* at R. 1.14(b).

109. MODEL RULES OF PROF'L CONDUCT R. 1.4 (2002).



to the juvenile justice agency, and acquisition of an unexpungeable record. As a result, the decisions that must be made are complex.

### *C. Effectively Raising the Competence Issue*

Some states have procedures governing how competency evaluations should be requested and the process that must be followed for the evaluation.<sup>110</sup> Even where these procedures do not exist, the attorney should assume that she must do certain things. The first of these is to present to the court the reasons for requesting the competency evaluation. This presentation will establish “bona fide doubt” of competence,<sup>111</sup> or probable cause to believe the youth may be incompetent. In deciding what information to provide to the court, the attorney must consider the impact of the Rules of Professional Conduct on her decisions, keeping in mind that the confidentiality rule “applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source.”<sup>112</sup>

If the court orders a competency evaluation, the attorney should specifically request that it be performed by someone with experience and training in the forensic evaluation of children.<sup>113</sup> “Fundamental aspects of this knowledge include (a) theories and empirical information about offenders’ *adolescent development*; (b) theories and understanding of aggression, delinquency, and *adolescent offenders*; (c) the nature and diagnosis of *adolescent psychopathology*; and (d) the *assessment of adolescents*.”<sup>114</sup> Finally, as a practical matter, the attorney should communicate with the evaluator in advance, to explain why she requested the evaluation.<sup>115</sup>

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110. See, e.g., VA CODE ANN. § 16.1-356 (Michie Cum. Supp. 2002).

111. See *Pate v. Robinson*, 383 U.S. 375, 385 (1966).

112. See MODEL RULES OF PROF’L CONDUCT R 1.6, cmt.

113. GRISSE, *supra* note 45, at 26. Grisso identifies a forensic evaluation as one which is “performed specifically for use in a legal forum or agency to assist in decisionmaking about a case.” *Id.* at 23.

114. *Id.* at 27-35.

115. Dr. Grisso recommends that evaluators contact the child client’s attorney in advance of conducting a competency evaluation in order to get relevant background information for the interview. *Id.* at 99.

From a practical standpoint, this communication is often best memorialized in writing.<sup>116</sup>

For example, the attorney might want the evaluator to know that the client has qualified to receive special education services because she is emotionally disturbed, or that a teacher reported the client often overreacts to situations or misinterprets other people's actions or words. If educational evaluations and records provide insight into the client's possible incompetence, the attorney should also provide these to the evaluator. The attorney should also consider relaying information from her own interviews with the child if it suggests the client may not always be grounded in reality. Ethical considerations similar to those that exist when raising the issue of competence before the court also exist when communicating with the evaluator.<sup>117</sup> Nonetheless, once the attorney representing a juvenile has made the decision to seek a competency evaluation, she should be vested in getting an accurate assessment. For the forensic evaluator to do a good job, she needs quality information that may be of a sensitive nature. To facilitate the provision of information and minimize negative consequences, some states exclude from the adjudicatory and dispositional stages any of the defendant's disclosures made during the competency evaluation or during a subsequent restoration process.<sup>118</sup>

Finally, the attorney should consider whether she would like to be present at the competency evaluation. Some evaluators want to exclude the defense attorney, because they see the attorney's presence as a confounding influence in the clinical setting, which could negatively impact the quality of the direct interview.<sup>119</sup> Other evaluators value the attorney's presence, because it gives the evaluator the opportunity to observe the attorney's interactions with

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116. This communication should be in writing because the evaluator may then refer to the written document prior to or during the evaluation as a memory refresher. It also provides a basis for the attorney to question the evaluator's report, if it does not address the issues that concerned the attorney.

117. See MODEL RULES OF PROF'L CONDUCT R. 1.6.

118. See, e.g., VA. CODE ANN. § 16.1-360 (Michie 1999); 2003 TEX. SESS. LAW SERV. § 46B.007 (Vernon). Arguably the Fifth Amendment would apply to statements made in a court-ordered competency requirement. See Redding & Frost, *supra* note 33, at 370-71.

119. These concerns would be lessened in a setting in which the attorney could observe through a mirrored window or closed circuit television.

the client and, thus, better gauge the youth's capacity to interact with and ultimately assist the attorney.<sup>120</sup> From the attorney's perspective, observing the evaluation allows the attorney to assess the quality of the evaluation and, if necessary, to challenge the evaluator's procedures or conclusions in subsequent legal proceedings.<sup>121</sup> For the attorney new to competency evaluations, observing the evaluation is an incredible learning opportunity. If the attorney is unable to observe, she should learn as much as she can about juvenile competency evaluation through other means.<sup>122</sup>

As a practical matter, in addition to providing the evaluator with information regarding concerns about the client's adjudicative competence, it is very important to explain to the evaluator the legal purpose of the evaluation and that the evaluation should address the different components of the *Dusky* and *Drope* legal standard.<sup>123</sup> While good forensic evaluators are well-versed in the legal standard, they may write evaluation reports in psychologists' clinical language, without necessarily taking into account the legal decision-makers' needs.<sup>124</sup> The lawyer requesting a forensic evaluation should, therefore, explain to the evaluator the importance of providing thorough documentation of the evaluator's conclusions and a detailed description of the logic used to reach them.<sup>125</sup>

While courts are generally good at understanding legal tests and standards, they are not necessarily schooled at incorporating mental health and other psychological information into those constructs,<sup>126</sup> particularly when the legal tests were developed in an era that

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120. GRISSE, *supra* note 45, at 100.

121. *Id.*

122. See MODEL RULES OF PROF'L CONDUCT R. 1.1 (2002) ("[a] lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."). According to the commentary, "[i]n determining whether a lawyer employs the requisite knowledge and skill in a particular matter, relevant factors include . . . the preparation and study the lawyer is able to give the matter . . ." *Id.* at R. 1.1. cmt. ¶ 1.

123. See *Dusky v. United States*, 362 U.S. 402 (1960). See also *supra* note 51 and accompanying text (discussing the *Dusky* and *Drope* standard).

124. GRISSE, *supra* note 45, at 24.

125. *Id.*

126. See, e.g., Joanmarie Ilaria Davoli, *Still Stuck in the Cuckoo's Nest: Why Do Courts Continue to Rely on Antiquated Mental Illness Research?*, 69 TENN. L. REV. 987, 995-96 (2002).

predates important research developments in mental health<sup>127</sup> and competence fields. A recent project undertaken by the MacArthur Foundation Research Network on Adolescent Development and Juvenile Justice looked at adolescents' cognitive and psychosocial capacities and how they relate to an adolescent's competence and compare to adult capacities.<sup>128</sup> The study was designed to examine three basic questions: "Do adolescents differ from adults in their abilities to participate in the adjudicative process—including police interrogation, consultation with their attorney, and trial? If they do, in what types of youths are these differences most apparent? And what kinds of deficits have implications for law, policy, and practice?"<sup>129</sup>

Among the study's interesting findings is one which calls into question competency evaluations that follow traditional evaluation formulas for adults but fail to look at and assess a juvenile's ability to use information to make decisions. Specifically, the study suggests that competency evaluations of juveniles "that focus only on what the youth does or doesn't understand are incomplete. Many of the differences between adolescents and adults have to do with their ability not merely to understand things, but to *use* information to make decisions."<sup>130</sup>

The juvenile appearing before a juvenile court has many important decisions to make. For example, a juvenile client might have to decide: whether to talk to the arresting police officers; whether to trust her attorney; whether to accept a particular plea bargain; whether to enter a guilty plea; and whether to object or concur in the decision to raise the competence issue. Thus, the person evaluating the juvenile should gauge her ability to use information to make those critically important decisions.

If the result of a competency evaluation suggests that the client is incompetent, it should be the defense attorney's role to educate the court on how the evaluation addresses all aspects of competence, including the juvenile's ability to use information to make important

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127. *Id.* at 996-1000.

128. Thomas Grisso et al., *Juveniles' Competence to Stand Trial: A Comparison of Adolescents' and Adults' Capacities as Trial Defendants*, 27 L. & HUM. BEHAV. 333 (2003).

129. Grisso & Steinberg, *supra* note 36.

130. *Id.*

decisions. A second goal must be to show how the evaluator's conclusions regarding the extent and nature of a client's competencies tie into the *Dusky* and *Drope* standard. In essence, the evaluator's testimony must take the language of one discipline—psychology—and translate it into the language of another—law. This may involve discussing not only how decision-making is tested, but also why decision-making is tested—connecting the evaluation to the legal requirement that the client be capable of making the decisions that are crucial and the ethical components of assisting counsel and having a rational understanding of the proceeding's objective.

In some cases, it may also be important to educate the court that deficits in competence may exist largely because the child defendant has not yet reached the stage in life where these competencies normally develop. Because many may find it difficult to accept the idea that children may escape responsibility for criminal acts just because they are young,<sup>131</sup> it is critical to educate the court that in a young enough person, competence deficits exist that are just as debilitating as they are for a person whose incompetence stems from mental illness or mental retardation.

#### IV. CONCLUSION

Juvenile delinquency court is often viewed as a training ground for lawyers who will move “up” the ladder to representing adult criminal defendants. We hope this Article helps to change that perspective. Good juvenile attorneys need all the skills good criminal defense lawyers need, and then some. As the Article notes, the ethical dilemmas that arise in juvenile representation can be more complex than those that when representing adults, because lawyers must be

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131. When Virginia amended its code to include a provision to determine juvenile incompetence, incompetence based on age and developmental factors was a topic of fierce debate. The final result states: “[i]f the juvenile is otherwise able to understand the charges against him and assist in his defense, a finding of incompetency shall not be based solely on . . . the juvenile's age or developmental factors . . .” VA. CODE ANN. § 16.1-356(F) (Michie 2002). Arguably this means that a youth who cannot understand the charges against him and who cannot assist in his defense because of age and developmental factors can still be found incompetent if lacking in requisite functional capacities.

prepared to deal with issues that can exist solely because the defendant is a child.

To address these dilemmas, particularly in a “get tough on juvenile crime” world, the attorney who represents children must develop some expertise in child development and be ready to appropriately present that knowledge to the court during the course of the proceedings. However, our knowledge of child development is rapidly changing. We are on the cusp of major findings about adolescent brain development. Current research shows that adolescent brains go through dramatic changes,<sup>132</sup> but researchers are just beginning to decipher the impact of those changes on thoughts, actions, abilities, and decision-making.

Similarly, we are just beginning to learn about adolescent competencies and how those competencies impact a youth’s participation in the justice system. These studies<sup>133</sup> may ultimately have a tremendous impact on policy and on the operation of the juvenile court. In the interim, they can and should have great significance for how individual attorneys assess their client’s capabilities, interact with their clients, and involve their clients in the important decisions that must be made in court proceedings. These research studies, along with legal and ethical considerations, suggest that attorneys should consider adjudicative competence in far more instances than they currently do.

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132. See Jay N. Gredd et al., *Brain Development During Childhood and Adolescence: A Longitudinal MRI Study*, 2(10) NATURE NEUROSCIENCE 861-63 (1999).

133. Grisso, et al., *supra* note 128.

## APPENDIX

This checklist of questions is designed to elicit information that may be relevant to an attorney's assessment of a juvenile client's competence. The questions are organized by area of inquiry. As is the case with most interviews, questions should be kept open-ended so as not to suggest answers. In addition, the accuracy of all information the attorney receives from the client should be checked against other sources. Keep in mind that children with disabilities that impair competence may be poor information reporters. Also keep in mind that this is not an outline for a complete interview—it merely suggests questions that may lead to information relevant to the competence issue.

*Age*

1. How old are you?
2. When is your birthday? Year? (The inability of a youth to provide a birth year is a serious red flag, suggesting either developmental immaturity or mental retardation, either of which could impact competence.)

*School Placement and Success*

1. What school do you go to?
2. What grade are you in? (Is this an appropriate grade for a person of the client's age? If not, the attorney should try to determine the reason for the discrepancy.)
3. What subjects are you studying? (Are these courses age appropriate? Do the courses suggest placement in special education classes?)
4. Who are your teachers? (Youth in self-contained special education classrooms may have fewer teachers.)
5. How many days of school do you typically miss in a week? Month? Semester? Reasons? (When children reach middle school and high school, truancy patterns may become more common among children who are not successful in school. Lack of success may arise from disabilities such as mental retardation or other disabilities that impact how the youth processes information, which could affect competence.)

*Health*

1. Who are your doctors? (Are there any mental health providers in the group?)
2. How often do you see the doctor? Why? (Are there any mental health issues involved that may be relevant to competence? Certain physical impairments may also affect competence.)
3. Have you ever talked to a therapist or psychologist? Why? (Again, probing for mental health issues relevant to competence.)
4. Have you ever been in the hospital? Why? (Are there any placements for mental health issues? For serious trauma?)
5. Are you taking any medicines? What? (Certain medications address mental health issues. Others may impair mental functioning.)
6. What do you take the medicine for? (Does the youth have an understanding of what the underlying issues are?)
7. How do the medicines make you feel? Better? Worse? Side-effects? (Are the medications impairing functioning in any ways relevant to competence?)
8. How often do you take the medicine? (Sometimes youth fail to take medications regularly.)
9. Do you ever use alcohol? Other illegal drugs? Which ones? (Use may impair cognitive process and may also be a sign of self-medicating for mental health conditions such as depression or post-traumatic stress syndrome.)
10. How often do you drink? Use drugs?
11. How much do you use at a time?
12. How recently did you last use? (Very recent use could affect the youth's understanding at the time of the interview.)

*Past Record*

1. Have you ever been to juvenile court before? (Previous experience with the court may mean the client has experience that might help him or her understand the process quicker than a client who is new to the system. If a youth with previous experience shows poor understanding, the attorney may have concerns about competence.)



2. What brought you to the court before? (Truancy referrals may raise concerns about school success—see questions above.)
3. What happened when you went to court before? (This is an opportunity to probe the youth's understanding of how the court process works.)
4. What judge was involved? (Because of the judge's pivotal role, juveniles often remember the judge's name even when they have forgotten everyone else's. Good memory test!)
5. Did you have an attorney? If so, what did the attorney do to help you? (Does the youth seem to have a sense of what the role of the attorney is?)

#### *Current Court Involvement*

1. Tell me about your current charge? (How does the youth's account match with the police report?)
2. When did this happen? (Young children and children with conditions such as mental retardation may have difficulty putting things in appropriate time sequences. They may also have trouble gauging the passage of time intervals such as a week or a month with any accuracy. Deficits in this area may seriously undermine the ability of a youth to assist counsel.)

#### *Recall/Memory*

Toward the end of an interview, it is often helpful to ask the client to remind you of some of the things you told her or him during the course of the interview and to ask her or him to explain to you some of the things you explained earlier. This gives an opportunity to observe both recall and comprehension. Areas that may be useful to discuss at this point may be:

1. Your name.
2. Your role as defense attorney.
3. The procedures that are typically followed in the courtroom.
4. The dispositions that the judge could impose at the end of the proceedings.